

United States District Court
Central District of California

THE TIRE HANGER CORPORATION,
Plaintiff,

MY CAR GUY CONCIERGE SERVICES INC.; SONIC AUTOMOTIVE INC.; PACIFIC LIFT AND EQUIPMENT COMPANY INC.; DOES 1-10, inclusive, Defendants.

Case No. 5:14-cv-00549-ODW(MANx)

**ORDER DENYING MOTION TO
EXTEND TIME TO RESPOND TO
THE COMPLAINT OR,
ALTERNATIVELY, TO STRIKE
THE WAIVER OF SERVICE AND
QUASH THE SUMMONS [13]**

I. INTRODUCTION

“When once the forms of civility are violated, there remains little hope of return to kindness or decency.”

—Samuel Johnson

Plaintiff The Tire Hanger Corporation initially attempted to serve Defendant My Car Guy Concierge Services Inc. (“Hoist Hanger”—a Canadian corporation—via Federal Express. But the summons and copy of the Complaint never actually made their way to Hoist Hanger. Then, misreading Federal Rule of Civil Procedure 4(d)(3), the parties made a gentlemen’s agreement that Hoist Hanger would have 90 days to respond to Tire Hanger’s Complaint in exchange for waiving personal service. But

1 when Tire Hanger went to file the executed Waiver of Service on the docket, the
 2 Court's filing system prevented it from selecting a response date beyond 60 days since
 3 Hoist Hanger's counsel received the waiver-of-service form in California. Counsel
 4 for Hoist Hanger proposed a stipulation that would achieve the 90-day result, but Tire
 5 Hanger's counsel apparently either declined or never responded—notwithstanding the
 6 parties' agreement.

7 Hoist Hanger now requests that the Court grant it an additional 30 days to
 8 respond to the Complaint. Alternatively, it moves to strike the Waiver of Service it
 9 executed and quash the originally filed Proof of Service. But strictly adhering to
 10 Federal Rule of Civil Procedure 4(d)(3), the Court **DENIES** Hoist Hanger's Motion
 11 on all grounds.¹ (ECF No. 12.)

12 II. FACTUAL BACKGROUND

13 On March 20, 2014, Tire Hanger filed this patent-infringement action against
 14 Defendant My Car Guy Concierge Services Inc., Sonic Automotive Inc., and Pacific
 15 Lift and Equipment Company Inc. (ECF No. 1.) The patents-in-suit relate to methods
 16 and an apparatus for supporting vehicle wheels that have been removed from a vehicle
 17 placed on a hoist. (Compl. ¶ 14.)

18 On April 14, 2014, Tire Hanger requested the Clerk of Court to send the
 19 summons and a copy of the Complaint via Federal Express to 1036 Ioco Road, Port
 20 Moody, British Columbia, V3H 2X1, Canada—Hoist Hanger's last known address—
 21 as provided under Federal Rule of Civil Procedure 4(f)(2)(C)(ii). (ECF No. 11, at
 22 Ex. 1.) The Clerk sent out the documents via FedEx, and a person signing as
 23 “Duncan” received the envelope on April 17, 2014. (*Id.* at Ex. 2.) On April 28, 2014,
 24 Tire Hanger accordingly filed a Proof of Service on the docket. (ECF No. 11.)

25 On April 29, 2014, David Caine, counsel for Hoist Hanger, informed Peter
 26 Veregge, counsel for Tire Hanger, that Rick Daley, Hoist Hanger's President, had
 27

28 ¹ After carefully considering the papers filed in support of and in opposition to the Motion, the Court
 deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

1 moved from the Ioco Road address in late March 2014. (Caine Decl. Ex. B.) Hoist
2 Hanger therefore never received the summons and Complaint. Since Daley was
3 traveling outside of Canada at that time, Caine offered to execute a waiver of service
4 “provided that the Tire Hanger agrees to the application of FRCP [4](d)(3)’s 90-day
5 extension of time to [sic] set forth for answer by a foreign defendant.” (*Id.*)

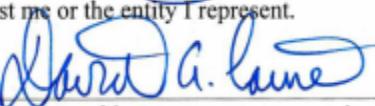
6 The next day, Veregge responded, stating that “if you get Mr. Daley or another
7 authorized Hoist Hanger representative to sign the attached Waiver of Service form,
8 and return that form to us by May 8, 2014, we will use that as proof of service instead,
9 and allow Hoist Hanger the 90-day period in which to answer under Rule 4(d).”
10 (*Id.* Ex. C.)

11 On May 1, 2014, Caine sent Veregge the executed Waiver of Service. (*Id.*
12 Ex. D.) Caine also requested that Tire Hanger confirm that it “will withdraw its notice
13 of service and file the attached waiver of service reflecting a response date 90 days
14 from April 30.” (*Id.*) Caine also circled “90 days” on the Waiver of Service as
15 depicted in Figure 1.

16 **Figure 1**

17 I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within
18 60 days from 04/30/2014, the date when this request was sent (or 90 days if it was sent outside the U.S.
United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

19 Date: 04/30/2014


Signature of the attorney or unrepresented party

20 My Car Guy Concierge Svcs., Inc. dba Hoist Hanger
Printed name of party waiving service of summons


David A. Caine

Printed name

22 On May 6, 2014, Veregge informed Caine that he was unable to select a 90-day
23 response deadline because Tire Hanger had to answer negatively to the CM/ECF filing
24 question “Was defendant addressed outside any judicial district of the United States?”
25 (*Id.* Ex. E.) Veregge thus selected a 60-day response deadline since Tire Hanger had
26 sent the waiver-of-service from to Hoist Hanger’s counsel in California—not Canada.

27 ///

28 ///

1 Hoist Hanger disputed the 60-day response deadline and insisted that the parties
 2 agree to an additional 30-day extension via stipulation. (*Id.*) Tire Hanger apparently
 3 never responded to the stipulation request.

4 On May 15, 2014, Hoist Hanger filed this Motion seeking an additional 30 days
 5 to respond to the Complaint or to strike the Waiver of Service and quash the original
 6 Proof of Service. (ECF No. 13.) Tire Hanger timely opposed. (ECF No. 16.) That
 7 Motion is now before the Court for decision.

8 III. DISCUSSION

9 Hoist Hanger requests that the Court grant it another 30 days to respond to Tire
 10 Hanger's Complaint for a total of 90 days. Alternatively, Defendant moves to strike
 11 the Waiver of Service it executed and quash the originally filed Proof of Service.
 12 Strictly following Federal Rule of Civil Procedure 4, the Court denies Hoist Hanger's
 13 Motion on all grounds.

14 A. Extension of time to answer Complaint

15 Hoist Hanger first asks the Court to grant it another 30 days to respond to Tire
 16 Hanger's Complaint. Federal Rule of Civil Procedure 4(d)(3) provides that a
 17 "defendant who, before being served with process, timely returns a waiver need not
 18 serve an answer to the complaint until 60 days after the request was sent--or until 90
 19 days after it was sent to the defendant outside any judicial district of the United
 20 States." Further, when a district court sets a deadline, a party must present "good
 21 cause" for modifying the schedule. Fed. R. Civ. P. 16(b)(4). The Ninth Circuit has
 22 held that this standard "primarily considers the diligence of the party seeking the
 23 extension." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)
 24 (internal quotation marks omitted).

25 Hoist Hanger argues that since it is a Canadian corporation, it is entitled to the
 26 90-day response deadline provided for in the last clause of Rule 4(d)(3). It also points
 27 out that counsel for both parties initially agreed to the 90-day deadline, and it was only
 28 Vereggé's inability to select that date in CM/ECF that prompted Tire Hanger to

1 change its position. Further, Hoist Hanger emphasizes that it is a small, two-person
2 operation with limited resources to investigate the allegations in the Complaint, so it
3 needs additional time.

4 But Tire Hanger asserts that the applicable Rule 4(d)(3) deadline does not hinge
5 on a defendant's residence; rather, the 90-day period only applies when the waiver-of-
6 service form is mailed to a defendant outside the United States. Tire Hanger also
7 argues that since Caine first communicated with Veregge on April 1, 2014, regarding
8 the Complaint, Hoist Hanger will essentially have the 90 days it seeks to respond to
9 the allegations.

10 Rule 4(d)(3)'s plain text easily resolves the parties' dispute. The Rule provides
11 that a defendant only has 90 days to respond to a complaint if the waiver of service
12 "was sent to the defendant outside any judicial district of the United States." Fed. R.
13 Civ. P. 4(d)(3). The waiver-of-service form was not sent to Hoist Hanger in Canada
14 or anywhere else outside of the United States. Instead, Tire Hanger sent the form to
15 Hoist Hanger's counsel in California. Strictly adhering the Rule's terms, Tire Hanger
16 correctly selected a 60-day response deadline.

17 Neither has Hoist Hanger demonstrated good cause for further extending the
18 response deadline to 90 days. One must consider that when a plaintiff personally
19 serves a defendant, the defendant only has 21 days to respond to the complaint. Fed.
20 R. Civ. P. 12(a)(1)(A)(i). As an incentive for waiving personal service, Hoist Hanger
21 now has nearly three times the normal response period in which to answer or
22 otherwise respond to Tire Hanger's Complaint. The Court understands that Hoist
23 Hanger runs a small operation, but that is not unusual. Defendants unrepresented by
24 counsel frequently adhere to response deadlines much shorter than the one Hoist
25 Hanger faces.

26 Perhaps the most shocking part of the events surrounding this Motion is that
27 Tire Hanger refused to honor its agreement that Hoist Hanger would have 90 days to
28 respond to the Complaint. While the parties apparently misunderstood Rule 4(d)(3)

1 when they initially agreed to the 90-day deadline, for all intents and purposes the
2 parties reached a gentlemen's agreement that Hoist Hanger would get 90 days to
3 answer in exchange for waiving personal service—and of course saving Tire Hanger
4 money. That the Court's filing system would not allow Veregg to select a 90-day
5 date did not preclude Tire Hanger from honoring its agreement through Hoist
6 Hanger's requested 30-day stipulation. In fact, the Local Rules specifically permit
7 parties to stipulate to an additional 30-day response period without court approval.
8 L.R. 8-3.

9 But instead of honoring their misguided agreement, Tire Hanger apparently
10 either ignored Hoist Hanger's request for stipulation or declined it. Moreover,
11 Plaintiff opposed this Motion, further dragging out what should really be a nonissue.
12 The Court certainly hopes that the parties' utter inability to resolve such a simple issue
13 this early in the litigation does not bespeak this action's future. The parties, their
14 clients, the Court, and the profession are all served when attorneys can work together
15 to resolve disputes amicably among themselves. Local Rule 7-3 contemplates as
16 much by requiring that parties meet and confer, preferably in person, before filing any
17 motion.

18 Finding no good cause for a 30-day extension, the Court **DENIES** Hoist
19 Hanger's Motion on this ground.

20 **B. Motion to strike waiver of service and quash summons**

21 Hoist Hanger next moves to strike the Waiver of Service it executed and Tire
22 Hanger filed on the docket and quash the first Proof of Service Tire Hanger filed.

23 *1. Waiver of service*

24 Hoist Hanger contends that the Court should strike its Waiver of Service
25 because it informed Tire Hanger before it filed the waiver on the docket that Tire
26 Hanger was not authorized to do so if it was going to select the 60-day response
27 deadline. But Tire Hanger emphasizes that Hoist Hanger validly executed the Waiver
28 of Service, so the Court should simply follow Rule 4(d)(3).

1 That the parties mistakenly read Rule 4(d)(3) does not render Hoist Hanger's
2 otherwise validly executed Waiver of Service involuntary. Hoist Hanger does not
3 argue that it was threatened into signing the form or that someone forged the signature
4 on it. In fact, it was Hoist Hanger itself that first offered to execute the waiver since
5 Daley had moved from the Ioco Road address and was traveling outside Canada.
6 Moreover, as the Court discussed above, Hoist Hanger is not even remotely prejudiced
7 by the current 60-day response deadline, as this is nearly three times the usual
8 response period permitted by the Federal Rules of Civil Procedure. The Court
9 accordingly **DENIES** Hoist Hanger's Motion on this ground.

10 2. *Summons*

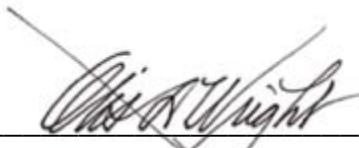
11 While Hoist Hanger also moves to quash the original Proof of Service which
12 Tire Hanger filed after serving a person named "Duncan" via FedEx, Tire Hanger
13 correctly points out that this issue is moot. When Tire Hanger filed Hoist Hanger's
14 Waiver of Service on the docket, it stated that "Plaintiff hereby withdraws its
15 previously filed Proof of Service against this Defendant, Docket No. 11." (ECF
16 No. 12, at 2.) The original Proof of Service is therefore no longer operative. The
17 Court thus **DENIES** Hoist Hanger's Motion on this ground **AS MOOT**.

18 IV. CONCLUSION

19 For the reasons discussed above, the Court **DENIES** Hoist Hanger's Motion in
20 its entirety. (ECF No. 13.) The parties are still free to stipulate to a 30-day extension
21 under Local Rule 8-3.

22 **IT IS SO ORDERED.**

23
24 June 4, 2014

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OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE